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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JACOB MICHAEL BARNES, Defendant and Appellant.	G042407 (Super. Ct. No. 07WF1453) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Paul R. Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Angela Borzachillo and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jacob Michael Barnes stands convicted of attempted murder. He contends the trial court misinstructed the jury on the elements of that offense and its relationship to the lesser included offense of attempted voluntary manslaughter. We disagree and affirm the judgment.

FACTS

On the night of May 6, 2006, Blake Archuleta went to a party in Huntington Beach. Soon after he arrived, party host James Kenney asked everyone to leave because the gathering was getting too big. Archuleta did not have a problem with that, but as he and his friend Alyssa Munoz were walking out the front door, Kenney grabbed some beer from Munoz. Archuleta told Kenney to give it back to her, but Kenney refused and asked Archuleta what he was going to do about it. Archuleta answered by head butting Kenney. A brawl ensued.

A group of Kenney's friends, including defendant, spirited Archuleta into the front yard and began hitting and kicking him. Archuleta fought back, punching defendant in the face. He then broke free from the pack and began to run away. But defendant was not done. He and some of his cohorts chased Archuleta down the street.

During the pursuit, Archuleta called a friend for help on his cell phone. He also called 911 and sought assistance from two men who were in the area. But eventually, alone and out of breath, he stopped and turned to face defendant and the others. He took a fighter's stance and may still have been holding onto his cell phone. But, he was no match for defendant, who had a knife. Defendant moved forward and stabbed Archuleta in the back as he turned to get away. He then stabbed Archuleta two more times as Archuleta struggled to escape. After that, defendant and his companions ran away, leaving Archuleta alone in the street with a perforated liver.

About three weeks later, defendant surrendered to the police. He was charged with attempting to murder Archuleta with premeditation and deliberation. At trial, he testified he was angry when Archuleta hit him during the fight outside the party.

He said when he finally caught up to Archuleta in the street, he thought he saw a weapon in his hand, so he drew his knife and used it to protect himself.

Based on defendant's testimony, the trial court instructed on self-defense, as well as the lesser included offense of attempted voluntary manslaughter on the theories of heat of passion and imperfect self-defense. However, the jury convicted defendant of attempted murder (albeit without premeditation and deliberation) and found true allegations he personally used a deadly weapon and inflicted great bodily injury. The court sentenced him to 10 years in prison.

I

Defendant mounts a lengthy attack on the jury instructions pertaining to attempted murder and attempted voluntary manslaughter. He claims first that the instructions lowered the prosecution's burden of proof by allowing the jury to convict him of attempted murder without reaching unanimous agreement on the issue of malice. The claim is not well taken.[1]

"We review de novo whether a jury instruction correctly states the law. [Citations.] Our task is to determine whether the trial court '"fully and fairly instructed on the applicable law." [Citation.]' [Citation.] When instructions are claimed to be conflicting or ambiguous, 'we inquire whether the jury was "reasonably likely" to have construed them in a manner that violates the defendant's rights.' [Citation.] We look to the instructions as a whole and the entire record of trial, including the arguments of counsel. [Citations.] We assume that the jurors are '"'intelligent persons and capable of understanding *and correlating* all jury instructions . . . given.'"' [Citation.] If reasonably possible, we will interpret the instructions to support the judgment rather than to defeat it. [Citation.]" (*People v. Franco* (2009) 180 Cal.App.4th 713, 720.)

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[1] Although defendant did not object to any of the jury instructions he challenges on appeal, we will entertain his arguments because the instructions arguably infringed his right to a fair trial. (Pen. Code, § 1259; *People v. Foster* (2010) 50 Cal.4th 1301, 1360, fn. 24.)

The principal instruction at issue in this appeal is CALCRIM No. 600. Per that instruction, the jury was told that in order to find the defendant guilty of attempted murder, the People had to prove defendant intended to kill another person, and he took at least one direct step toward achieving that objective. As set forth in section II below, the instruction also explained what constitutes a direct step for purposes of committing the crime of attempted murder.

Pursuant to CALCRIM Nos. 603 and 604, the jury was also instructed on the lesser included offense of attempted voluntary manslaughter. Those instructions explained an attempted killing that would otherwise constitute attempted murder is "reduced" to attempted voluntary manslaughter "if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion" (CALCRIM No. 603), or "the defendant attempted to kill a person because he acted in imperfect self-defense," i.e., in the honest but unreasonable belief he needed to defend himself (CALCRIM No. 604). The court further explained the People had the burden of proving beyond a reasonable doubt the defendant did not act in heat of passion or imperfect self-defense (CALCRIM Nos. 603, 604), and if the People did not meet this burden, the defendant was entitled to an acquittal (CALCRIM No. 220).

Defendant faults CALCRIM No. 600 for failing to adequately explain the concept of express malice. We disagree. Viewing the instructions as a whole, we believe they correctly informed the jury of that requirement.

Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) Malice may be express or implied for the crime of murder, but attempted murder requires *express* malice. (*People v. Lasko* (2000) 23 Cal.4th 101, 107; *People v. Lee* (1987) 43 Cal.3d 666, 670.) That requirement is generally satisfied upon proof the defendant acted with the intent to kill. (*People v. Rios* (2000) 23 Cal.4th 450, 460; *People v. Lasko, supra,* 23 Cal.4th at p. 107.) In fact, "unlawful 'intent to kill' is the functional equivalent of express malice." (*People v. Swain* (1996) 12 Cal.4th 593,

601.) However, a defendant who intentionally attempts to kill another will be deemed to lack malice when he acts in heat of passion or imperfect self-defense. (*People v. Rios, supra*, 23 Cal.4th at pp. 460-461; *People v. Breverman* (1998) 19 Cal.4th 142, 153.) In that situation, the defendant will be guilty, at most, of the lesser included offense of attempted voluntary manslaughter. (*Ibid*.)

As our Supreme Court has explained, the "mitigating circumstances" of heat of passion and imperfect self-defense "reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in [an intended killing] [citation].' [Citation.] *Provocation* has this effect because of the words of [Penal Code] section 192 itself, which specify that an unlawful killing that lacks malice because committed 'upon a sudden quarrel or heat of passion' is voluntary manslaughter. [Citation.] *Imperfect self-defense* obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand. [Citations.]" (*People v. Rios, supra*, 23 Cal.4th at p. 461.)

Given the foregoing principles, the "complete definition" of express malice has been described as "the intent to kill . . . *plus the absence of both* heat of passion and [imperfect] self-defense." (*People v. Breverman, supra*, 19 Cal.4th at pp. 189-190 (dis. opn. of Kennard, J.).) Relying on this definition, defendant argues CALCRIM No. 600 is incomplete because it only addresses the first component of malice, that being the intent to kill. However, the second component of the definition — the absence of mitigating circumstances — is fully explained in CALCRIM Nos. 603 and 604. Those instructions correctly informed the jury heat of passion and imperfect self-defense can reduce the crime of attempted murder to attempted voluntary manslaughter, and defendant could not be convicted of attempted murder unless the prosecution proved these mitigating circumstances did not exist. Thus, all the components of express malice, i.e., the intent to

kill, plus the absence of both heat of passion and imperfect self-defense, were properly conveyed to the jury.

Defendant recognizes this, but he claims those components should have been set forth in a single, unified instruction. He argues this was necessary to ensure the jury understood it could not convict him of attempted murder unless the prosecution proved he possessed the intent to kill *and* he did not act in the heat of passion or imperfect self-defense. However, as noted above, jurors are presumed to be intelligent people who are capable of understanding *and correlating* all of the instructions they are given. (*People v. Franco*, *supra*, 180 Cal.App.4th at p. 720.) And based on the record before us, there is every reason to believe they would have been able to understand and correlate the instructions on attempted murder and attempted voluntary manslaughter in this case.

Our conclusion is this regard is supported by several factors. First, the court's instructions on attempted voluntary manslaughter as set forth in CALCRIM Nos. 603 and 604 expressly referred to attempted murder as that offense is defined in CALCRIM No. 600. Second, the former instructions followed closely on the heels of the latter, with only the instructions on premeditation coming between them. And third, the court instructed the jury to "[p]ay careful attention to all of the instructions and consider them together." (CALCRIM No. 200.) Considering all these circumstances, it is reasonable to presume the jury knew the instructions on attempted murder and attempted voluntary manslaughter were related, and the intent to kill plus the absence of heat of passion and imperfect self-defense were required to convict defendant of attempted murder.

Nevertheless, defendant argues that, as a practical matter, the jury would have been unable to navigate these instructions correctly, given the presence of another instruction, CALCRIM No. 3517. That instruction states, "If all of you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser

crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct. . . . It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime. . . . If you all agree the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form for that count."

Although CALCRIM No. 3517 allows jurors to consider the charged and lesser included offenses in any order they like, defendant assumes that in his case, they considered the charged offense of attempted murder first. He also speculates that once they determined the core elements of that offense were proven, i.e., defendant intended to kill and took a direct step toward effectuating that intent, they were likely to end their deliberations there without considering whether the mitigating circumstances of heat of passion or imperfect self-defense were present, so as to reduce the crime from attempted murder to attempted voluntary manslaughter.

In so arguing, defendant hangs his hat on the last two sentences of CALCRIM No. 3517, which told the jurors that if they found the defendant guilty of a greater offense, they must convict on that offense and not a lesser included one. However, this language simply prevented the jurors from convicting defendant of both a greater and lesser offense; it did not preclude them from considering any particular instructions in determining whether defendant was actually guilty of any one particular offense. It did not prevent the jurors from considering the instructions on heat of passion and imperfect self-defense in determining whether defendant was guilty of attempted murder.

Moreover, as we have explained, the court instructed the jury to consider the instructions as a whole, and it was clear from their content and proximity to each

other that CALCRIM No. 600 and CALCRIM Nos. 603 and 604 went hand in hand. Indeed, the latter instructions specifically informed the jury an attempted killing that constitutes attempted murder is reduced to attempted voluntary manslaughter if the defendant acted in heat of passion or imperfect self-defense. In addition, the parties spent the bulk of their closing arguments discussing the applicability of these mitigating circumstances. The attorneys' statements made it clear that heat of passion and imperfect self-defense reduce the crime of attempted murder to attempted voluntary manslaughter. Under these circumstances, it is virtually inconceivable the jury would have failed to consider CALCRIM Nos. 603 and 604 in deciding whether defendant was guilty of attempted murder under CALCRIM No. 600.

Even so, defendant raises an additional concern regarding the relationship between these instructions. He theorizes that even if a jury did consider CALCRIM Nos. 603 and 604 after finding the core elements of CALCRIM No. 600 were proven, it would be inclined to convict a defendant of attempted murder, even if it was deadlocked on the issues of heat of passion or imperfect self-defense. Although a mistrial would be appropriate in that situation, defendant argues that if a jury was unable to reach a unanimous decision on the mitigating circumstances, it would fall back on CALCRIM No. 3517 and find the defendant guilty of "the greater crime," i.e., attempted murder.

Our response is two-fold. First, there is no indication in the record the jury had any problems with the court's instructions. During deliberations, the jury did ask the court for "a legal definition of 'intent,'" but we do not take from this that the jury was confused as to the interrelationship between attempted murder and attempted voluntary manslaughter, which is the thrust of defendant's complaint.

Second, the jury was properly instructed the prosecution had the burden of proof on the mitigating circumstances, and if it did not prove beyond a reasonable doubt that defendant did not act in heat of passion or imperfect self-defense, defendant was entitled to an acquittal. (CALCRIM Nos. 603, 604, 220.) Again, this is something the

parties reiterated extensively during their closing arguments, so, it is not reasonably likely the jury's verdict stemmed from a misunderstanding of the law.

For all these reasons, we reject defendant's claim the court's instructions regarding the issue of express malice were deficient. Considering everything the jurors were told, it is not reasonably likely they convicted defendant of attempted murder without reaching unanimous agreement on this issue. Therefore, the instructions on malice are not cause for reversal.

II

Defendant also contends the trial court misinstructed the jury on the core elements of attempted murder. He argues this undermined the fairness of his trial by lowering the prosecution's burden of proof, but we do not agree.

As noted above, the trial court instructed the jury that in order to find the defendant guilty of attempted murder, the People must not only prove he harbored the intent to kill, but also that he "took at least one direct but ineffective step towards" that end. (CALCRIM No. 600.) The court further explained, "A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (CALCRIM No. 600.)

Defendant argues the court's use of the term "direct step" is materially at odds with the statutory definition of the physical requirement for an attempt, which is "a direct but ineffectual *act* done toward" the commission of the attempted offense. (Pen. Code, § 21a, italics added.) However, as defendant concedes, the California Supreme Court has used the term "direct step" in describing the physical requirement for a

criminal attempt. (See, e.g., *People v. Rundle* (2008) 43 Cal.4th 76, 140 [sufficient evidence existed to support conviction for attempted rape where the defendant "had the specific intent to rape . . . and took a direct step beyond mere preparation toward effectuating his intent."]; *People v. Dillon* (1983) 34 Cal.3d 441, 452-454 [in upholding instruction which described the physical requirement for attempt as "an immediate step in the present execution of the criminal design," court states there is no basis for an abandonment defense once the defendant "has taken direct steps towards committing the prohibited act."].) This suggests the term "direct step" is a suitable substitute for the term "direct act" for purposes of that particular requirement.

In any event, whether defined as a "direct step" or a "direct act," there is absolutely no question defendant amply satisfied the physical requirement for attempted murder. The record shows he chased the victim down for several blocks and then stabbed him multiple times with a deadly weapon. Thus, as far as the physical requirement is concerned, any error in the court's use of the "direct step" terminology was harmless beyond a reasonable doubt.

Defendant's criticism of the instruction does not stop there, however. He also impugns the "direct step" language as implying his actions were carried out as part of a series of events or pursuant to some grand plan or scheme. In fact, the instruction mentions the word "plan" several times. He fears the use of these terms improperly suggested to the jurors that they could find he harbored the requisite intent for attempted murder simply on the basis he took a direct step toward the commission of that offense. He even goes so far as to say the court's instructions created an impermissible mandatory presumption in that regard, by telling the jury, "A direct step indicates a definite and unambiguous intent to kill."

The problem with defendant's argument is that it completely ignores the context in which the subject language is contained. CALCRIM No. 600 plainly states that attempted murder has two distinct elements: 1) The intent to kill, and 2) the

commission of a direct but ineffective step toward that aim. It then goes on to explain what a direct step is *for purposes of the second element*, i.e., the physical requirement. That language does not purport to be controlling on the separate and distinct element of intent. To be sure, "[t]hese elements are related; usually, whether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. [Citation.] [But] [r]ead in context, it is readily apparent the challenged language refers to the [physical] *act* that must be found, and is part of an explanation of how jurors are to determine whether the accused's *conduct* constituted the requisite direct step or merely insufficient planning or preparation." (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 557, italics added.)

As the Attorney General points out, the jury was also properly instructed per CALCRIM Nos. 225 (circumstantial evidence) and 252 (union of act and intent) that a finding of guilt on the attempted murder charge required proof that defendant not only committed the prohibited act, but that he did so with the requisite specific intent. These instructions further underscored the separateness of the intent and act requirements for the crime of attempted murder. Considering the jury's charge as a whole, it is not reasonably likely it conflated these elements. Therefore, there is no basis to disturb the judgment.

DISPOSITON

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.